DEPARTMENT OF INSURANCE
ADMINISTRATIVE LAW BUREAU
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BEFORE THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of PAR EXCELLENCE PERSONNEL, INC., Appellant, From a Decision of THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA, Respondent.	FILE NO. ALB-WCA-92-4

DECISION

This matter was heard before Administrative Law Judge Jerry L. Whitfield, in Los Angeles, on May 12, 1994.

Appellant Par Excellence Personnel, Inc., was represented by Sandra J. Rogers, Director of Personnel Services, and Bonnie Royster, President, Par Excellence Personnel, Inc., 910 E. Stowell Road, Santa Maria, California.

Respondent Workers' Compensation Insurance Rating Bureau of California ("Bureau") was represented by John N. Frye, Esquire, of the law firm of Frye & Alberts, 1901 Avenue of the Stars, Suite 390, Los Angeles, California, Carol L. Joyce, Vice President-Legal, W.C.I.R.B., and Brenda J. Keys, Senior Staff Attorney, W.C.I.R.B., Spear Street Tower, Suite 500, One Market Plaza, San Francisco, California.

The argument of the parties was received as well as testimonial and documentary evidence. Official Notice was taken of the provisions of the California Insurance Code and California

Code of Regulations applicable to the business of Workers' Compensation Insurance.[1]

The record was closed and the matter was submitted for decision on May 12, 1994, subject to the filing of closing briefs. The closing briefs of both parties were received on July 29, 1994.

SUMMARY OF DECISION

This matter is an appeal to the Insurance Commissioner pursuant to the provisions of California Insurance Code section 11753.1. Section 11753.1 provides that a person aggrieved by a decision, action or omission to act of a rating organization may file a written complaint and request for hearing with the Insurance Commissioner if the rating organization rejects or fails to act upon a request for reconsideration of the offending decision, action or omission to act.

The decision, action or omission complained of is the Bureau's determination, expressed in the October 21, 1992, minutes of its Classification and Rating Committee, that except as provided in Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan, those employees of Appellant provided to clients pursuant to an employee leasing arrangement are properly combined with Appellant's administrative employees, and those employees provided on a temporary basis, for purposes of both the determination and application of an experience modification.

For the reasons set forth below, the decision of the Bureau is affirmed.

FINDINGS OF FACT

I

The Bureau is a rating organization within the meaning of Insurance Code section 11750.1, holds the license required by Insurance Code section 11751, and has been designated the

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[1] The business of workers' compensation insurance is regulated generally by the provisions of Section 11630 *et seq.*, of the Insurance Code, and regulations codified in Title 10 of the California Code of Regulations. The Bureau separately publishes and administers Title 10, sections 2318 and 2318.5 (California Workers' Compensation Unit Statistical Plan), section 2350 (Rules, Classifications and Basic Rates for Workers' Compensation Insurance), section 2352.1 (California Workers' Compensation Retrospective Rating Plan), and Section 2353 (California Workers' Compensation Experience Rating Plan).

Insurance Commissioner's statistical agent pursuant to Insurance Code section 11751.5.

The Bureau is an association of more than 400 workers' compensation insurance companies, which, due to its licensed status as a rating organization and designation as the statistical agent of the Insurance Commissioner, is largely responsible for the administration of the commissioner's regulations.

II

This appeal was filed with the Insurance Commissioner on December 11, 1992, and, as previously stated, seeks review of an adverse decision of the Classification and Rating Committee of the Bureau dated October 21, 1992. The decision of the Classification and Rating Committee constitutes action upon a request for reconsideration within the meaning of Insurance Code section 11753.1.

III

Experience rating is a rating procedure utilizing the past insurance experience of a risk[2] to develop an experience modification factor (expressed as a percentage) which is then applied to the premium computed using Manual rates. The procedure measures the risk's previous loss experience against the loss experience of other risks in the same classification(s).

Manual rates are factored at 100%. An experience modification of less than 100% results in a credit, and one greater than 100% results in a debit.

IV

A risk is eligible for application of the experience rating plan if it develops a minimum premium[3] by applying Manual rates to the total remuneration that would be used in the rating calculation. A risk that does not develop the required minimum premium will pay premium based upon the Manual rates, without modification due to the particular risks previous loss experience.

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[2] Section II, Rule (1) of the Experience Rating Plan defines "risk" as ". . . all insured operations of any entity within the State. . ." "Entity" is defined by Section II, Rule (4) as "an individual, joint venture, partnership, corporation, unincorporated association or fiduciary operation."

[3] Section III, Rule (1), California Workers' Compensation Experience Rating Plan. Effective January 1, 1992, the minimum premium was $21,600.

V

The Appellant is a personnel agency that, in addition to other services, provides temporary employees, leased staff and personnel administration to various clients.

VI

In an employee or staff leasing arrangement, Appellant enters into a contractual agreement in which Appellant becomes a co-employer of all or a part of a clients workforce. Under the arrangement, Appellant becomes the employer of record for tax and payroll purposes, and payroll is reported under one federal and state tax ID number. The Appellant pays federal and state taxes, unemployment insurance and workers' compensation insurance premiums, and sums due for other mandated benefits. Each of these costs are ultimately billed to and paid for by the client, which retains all management control over the day to day work performed by the employees. The Appellant holds no ownership interest in the business of a client.

VII

Appellant's staff leasing clients are small businesses for the most part; which, if considered individual risks, would not generate sufficient premium under Manual rates to qualify for application of the experience rating plan.

VIII

For purposes of the application of the experience rating plan, the Bureau considers Appellant to be the employer of employees leased to clients under a leasing arrangement. Accordingly, the payroll and losses of employees working at each of the clients businesses are combined with that of Appellant's corporate staff and temporary employees to determine an experience modification for Appellant. The Bureau's position seems first to have been conveyed to Appellant in February 1990, at a meeting attended by representatives of the Appellant, its insurance broker, California Compensation Insurance Company and the Bureau. At that meeting a Bureau representative informed Appellant that the Bureau's interpretation of the Insurance Commissioner's regulations governing experience modifications was that non-rated clients of employee leasing companies are combined for experience rating.

Application of the Bureau's procedure for determining a combined experience modification does not in and of itself mandate either a debit or credit experience modification. That factor is determined upon the basis of the loss experience and payroll of the total enterprise. Application of the Bureau's

procedure has resulted in credit modifications for some staff leasing companies.

IX

On July 21, 1990, California Compensation Insurance Company issued one policy covering Appellant's corporate staff and temporary service employees, a single policy for all non-rated clients, and separate policies for each experience rated client. Premium for the policy covering non-rated clients was developed using Manual rates.

X

On or about July 11, 1991, Appellant was billed by California Compensation Insurance Company for additional premium due for the policy period of July 21, 1990, through July 20, 1991. This additional premium resulted from the issuance of an Experience Rating Form by the Bureau that combined corporate staff, temporary service employees, and employees leased to non-rated clients for the purpose of experience rating. The combined experience modification was 187%

At the same time Appellant was billed for the renewal period of July 21, 1991, through July 20, 1992, based upon the application of a combined experience modification.

XI

On July 19, 1991, Appellant filed a complaint with the Bureau in which it protested the action of California Compensation Insurance Company set forth in Finding X, and the 187% experience modification.

XII

On November 15, 1991, the Bureau issued an Experience Rating Form for California Indemnity Insurance Company Policy No. N1013953 A, effective July 21, 1991, for Par Excellence Personnel Inc. This form included an experience modification of 190%, and combined corporate staff, temporary service employees, and employees leased to non-rated clients for the purpose of determining the experience modification.

XIII

The California Indemnity Insurance Company coverage replaced or superseded the renewal coverage provide by California Compensation Insurance Company, and was provided upon the following basis: A policy was issued for the corporate employees

and temporary service employees of Appellant, and separate policies were issued in the name of each client.

XIV

On May 11, 1992, the Appellant expanded its complaint to include the coverage issued by California Indemnity Insurance Company, and the 190% experience modification.

XV

The concept of employee leasing is specifically addressed in the regulations of the Insurance Commissioner in two rules. These are Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan; both adopted in 1990. By their terms, both rules apply only to an experience rated entity that enters into an employee leasing arrangement pursuant to which (1) the employment of a majority of employees of the entity are transferred to one or more labor contractors and (2) the services of the employees thereafter are provided to the entity. When the rules apply, coverage for the labor contractor's liability to provide coverage for workers' compensation benefits for the workers leased to the entity must be written under a separate policy in the name of the labor contractor, the experience modification and reported experience of the entity will apply to the coverage, and experience reported in connection with the coverage will not be used in the future ratings of the labor contractor. It is clear that under operation of the rules, the labor contractor is considered to be the employer.

Neither the commissioner's regulations nor the Insurance Code provide a specific definition of an "employee leasing arrangement" for any other purpose or application.

XVI

In recommending a 1985 rule regarding subterfuge (Section I, Rule (6) of the Experience Rating Plan), and in preparing the changes adopted in 1990, the Bureau attempted to work closely with the employee leasing community. Prior to the 1990 rule changes the Bureau met with representatives of the National Staff Leasing Association to explain its understanding of employee leasing arrangements. It was then the understanding of the Bureau that the employee leasing company became the legal employer in order to provide their clients economy of scale in health and other group insurance programs, and to achieve the recognition of various taxing entities. The Bureau never disputed the employee leasing companies characterization that they were the employer and accepted the characterization that the employee leasing company belonged in Item 1 of a workers'

compensation insurance policy as the named insured. The Bureau developed the exceptions relating to experience rating expressed in Special Rule VI of the Insurance Manual and Section III, Rule (16) of the Experience Rating Plan upon this understanding of the normal treatment to be afforded an employee leasing arrangement.

DISCUSSION

The Appellant has characterized the Bureau's development and application of a combined experience modification as both, (1) the product of a misinterpretation of Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan, and, (2) the result of an incorrect determination that for workers' compensation insurance purposes, Appellant is the "employer" of employees leased to clients.

Appellant contends that the result of the Bureau's procedure is that small businesses will pay more for workers' compensation insurance; solely because they use Appellant's services. This outcome, per Appellant, is contrary to public policy, unduly burdens small businesses, and provides a premium windfall to insurers.

Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan

Appellant argues that these rules should logically be interpreted to apply to non-rated as well as experience rated entities. Appellant contends as well that there is no logical reason for treating non-rated and experience rated entities in different manners.

As set forth in Finding XV, it is clear from the plain language of both rules that their effects do not apply to non-experience rated clients, and that they may not logically be interpreted so as to apply.

It is clear as well from the historical review provided before the Classification and Rating Committee and at the appeal hearing, that Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan were adopted for the purpose of preventing experience rated employers from avoiding debit modifications through use of an employee leasing arrangement. The exceptions were adopted for the purpose of addressing a specific condition, and are not authority for the Appellant's avowed logic for treating non-experience rated clients in an identical manner.

The Characterization of Appellant as the "employer"

In support of its contention that the Bureau has incorrectly determined that the Appellant is the employer of employees leased to a client for workers' compensation purposes, Appellant relies upon the co-employer relationship; with day to day control of employees and safety compliance responsibility residing with the client co-employer. These factors, argue Appellant, are the ones that should be considered in determining which of the co-employers is the "employer" for purposes of the application of the workers' compensation law; or more specifically the Experience Rating Plan.

Neither the Commissioner's regulations nor the Insurance Code provide a definition of "employer" that is helpful in a determination of the issue presented. However, the Insurance Code does acknowledge dual employer arrangements.

Insurance Code section 11663 provides in pertinent part:

> "As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his or her payroll at the time of injury, in which case the insurer of the special employer is solely liable." (emphasis added)

An application of the Appellant's characterization of its business relationship with its clients leads to the conclusion that Appellant is a general employer and that the clients are special employers. While Insurance Code section 11663 has been the subject of substantial judicial tinkering, the fact remains that in the vast majority of workers' compensation insurance claims the payroll co-employer (general or special) and that employers insurer, are responsible for the total cost of compensation; and the right to control employees is not determinative.

Upon the basis of the allocation of risk set forth in Insurance Code section 11663, it is reasonable to conclude that Appellant, as the payroll employer, is the employer for purposes of the application of the workers' compensation law generally, and the Experience Rating Plan; specifically.

Put another way: Because Appellant is the payroll employer, Appellant is the "Entity" (corporation) within the definition of Section II, Rule (4) of the Workers' Compensation Experience Rating Plan, and, pursuant to Section II, Rule (1) of the plan, the Appellant's insured operations at any place where corporate

staff, temporary staff, or leased staff are located, constitute the "risk" contemplated by the plan. The client businesses, even though they are co-employers, are not considered individual risks within the meaning of the experience rating plan.

The interpretation of the Bureau is consistent with the allocation of risk set forth in Insurance Code section 11663, as are Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan. Neither the Insurance Code nor the commissioner's regulations provide an exception for small businesses entering into employee leasing arrangements.

Reliance upon the advice of Insurers

An additional issue raised by Appellant is that Appellant relied upon the opinion of its insurance carriers in issuing coverage for non-rated clients at Manual rates. If such was the opinion of insurers, Appellant could not have justifiably relied upon that opinion. As early as February 1990, the Bureau told Appellant and California Compensation Insurance Company of its interpretation of the Commissioner's regulations. The Bureau, thereafter, consistently applied that interpretation in developing the experience modifications that are the subject of this appeal.

DETERMINATION OF ISSUES

I

Upon the basis of Finding XV and the Discussion with regard to Special Rule VI of the California Workers' Compensation Insurance Manual and Section III, Rule (16) of the California Workers' Compensation Experience Rating Plan, it is determined that the Bureau has properly interpreted the provisions of both rules, and they may not logically be interpreted to apply to non-rated entities.

II

Upon the basis of Findings V, VI, VIII, XV and XVI, and the Discussion with regard to the characterization of Appellant as the "employer", it is determined that for purposes of the application of the Experience Rating Plan, the Appellant, as the payroll co-employer, is properly considered the "employer" of employees leased to clients.

III

Upon the basis of Finding VIII, and the Discussion with regard to Appellant's reliance upon the advice of insurers, it is determined that Appellant could not have justifiably relied on the opinion of insurers contrary to the expressed interpretation of the Bureau.

IV

Based upon the fact stated in Finding VIII, that application of the Bureau's procedure in determining a combined experience modification does not in and of itself mandate either a debit or credit modification, it is determined that application of the Bureau procedure is not contrary to public policy, does not unduly burden small businesses, and does not provide a premium windfall to insurers.

V

Upon the basis of the Findings, considered as a whole, the Discussion and Determinations I through IV, it is determined that the Bureau properly developed and applied combined experience modifications for those policies and coverages described in Findings IX, X, XII and XIII.

VI

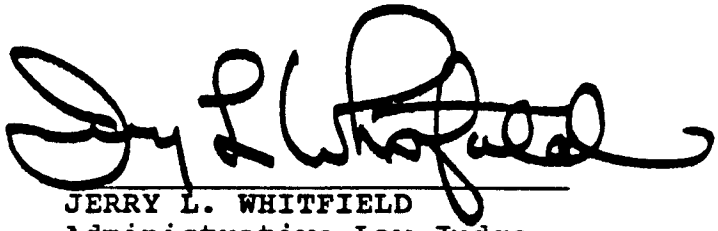
The contentions of the parties that are otherwise inconsistent with this decision, are rejected.

ORDER

1. Upon the basis of Determinations of Issues I through VI, the decision of the Workers' Compensation Insurance Rating Bureau is affirmed.

2. Pursuant to the provisions of Insurance Code section 11754.5, this Decision and Order shall be effective 20 days from the date hereof.

DATED: September 20, 1994



JERRY L. WHITFIELD
Administrative Law Judge
California Department of Insurance